trary to the assertion of the Michigan court in the passage quoted above—that "recitals [in state judgments] of jurisdiction," i. e., of jurisdictional facts, *are* sometimes conclusive upon the courts of other states. If the defendant was beyond the jurisdiction of the state, they are not conclusive; if he was subject to the state's jurisdiction they may be made conclusive—at least so far as service of process is concerned—if the state law so declares. If so made, they are then entitled to full faith and credit. Consequently, when suit is brought in another state upon such a judgment, before the court can determine whether the defendant may show want of service in order to show lack of jurisdiction, it must first of all inquire into the law of the state rendering the original judgment. If that law makes the recital of service conclusive, it will, in all cases in which the defendant at the time of the alleged service either was in the state concerned or was a citizen thereof, be conclusive in all other states.[19]

W. W. C.

APPEALS FROM JUDGMENTS OF PRIZE COURTS

A recent decision of the Judicial Committee of the Privy Council in *The Stigstad* (1918, P. C.) 35 Times L. R. 176, again emphasizes the anomalous character of the jurisdiction of prize courts.[1] In that case a Norwegian vessel bound from Norway to Rotterdam with iron-ore briquettes belonging to neutrals but alleged to be destined to Germany, was stopped on the high seas under the Order in Council of March 11, 1915, and ordered to discharge her cargo. The Order, admittedly a measure of retaliation against the German war-zone decree, undertook, without establishing a legal blockade, to prohibit all commerce to neutral ports in cargo bound to or from Germany.[2] In the instant case the neutral cargo was sold by consent and a sum allowed for freight, but the claim of the neutral vessel for detention and expenses was dismissed[3] on the ground that (1) with respect to the necessity for reprisals, the court is concluded by the recitals of the Order in Council;

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[19] In the case before the Michigan court the suit was on a Pennsylvania judgment. It happens that that State permits a return of service to be attacked in a suit on a judgment, so that the result reached by the Michigan court was correct. The doctrine announced in the opinion, however, will, if followed, ultimately lead to error in other cases.

[1] See 2 Westlake, *Int. L.*, 289.

[2] The American protest characterizing the Order in Council as illegal may be found in an instruction of the Secretary of State to Ambassador Page, March 30, 1915, Special Suppl. to (1915) 9 AMER. J. INT. L., 116. The Order itself will be found at p. 110.

[3] *The Stigstad* [1916] P. 123, affirmed by the Privy Council, (1918) 35 Times L. R. 176.

and that (2) in its enforcement no excessive hardship was imposed on neutrals. The effect of the opinion is that when belligerents by way of reciprocal retaliation depart from recognized rules of international law, it is the function of belligerent prize courts to determine how far neutrals must suffer losses without redress.

The decision illustrates the peculiar nature of the prize jurisdiction and the reason for the rule that prize decisions are not and should not be internationally conclusive. Such a decision is final as between the captors and the original owners so far as concerns private title *in rem.*[4] But the government whose citizen is aggrieved by the decision may always contest it and hold the State in whose court it was rendered internationally responsible for unjust, and even for erroneous judgments due to misapprehension or misapplication of the rules of international law. This is especially true where the court applies the regularly decreed rules of municipal law in derogation of rules of international law.

The jurisdiction of the prize court and the extent of its subservience to municipal rules contravening international law is not entirely clear. Were it really to apply international law in disregard of contravening provisions of municipal law, there might be less foundation for an international protest, although it has been repeatedly asserted that foreign governments will not permit a municipal judgment which misinterprets or violates international law to be set up as a bar to an international claim.[5] *A fortiori,* this conclusion follows when the court admittedly applies municipal law regardless of its consistency with international law.[6]

Lord Stowell in *The Maria*[7] asserted with firmness that he applied the law of nations only. Some twelve years later, however, when in 1811[8] he came to deal with the Orders in Council by which a paper blockade of France was declared as a retaliatory measure for the Berlin and Milan decrees of Napoleon, he admitted that the King in council had "legislative" powers over the prize court which the court was bound to obey. But he avoided any admission that the Orders were violative of international law by acting upon the presumption—which apparently was "not rebuttable"—that as reprisals were a recog-

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[4] *The Countess of Lauderdale* (1802, Eng. Adm.) 4 C. Rob. 283, 286; *Williams v. Armroyd* (1813, U. S.) 7 Cranch, 423.

[5] Wheaton, *Int. Law* (8th ed. by Dana, 1866) secs. 392-397; Martens, *Précis,* sec. 97; Borchard, *Diplomatic Protection of Citizens Abroad,* 342.

[6] Mr. Bayard, Sec'y of State, to the President, Feb. 26, 1887, 6 Moore, *Digest of Int. Law,* 667; *Howland* (U. S.) *v. Mexico,* Apr. 11, 1839, Moore, *Arb.* 3227; *Mather and Glover* (U. S.) *v. Mexico,* July 4, 1868, *ibid.* 3231.

[7] (1799, Eng. Adm.) 1 C. Rob. 340, 350; see also *The Recovery* (1807, Eng. Adm.) 6 C. Rob. 341, 349; see the American case of *The Diwina Pastora* (1819, U. S.) 4 Wheat. 52.

[8] *The Fox* (1811, Eng. Adm.) Edwards, 311.

nized belligerent weapon the orders conformed to the law of nations.[9] This is very much like Marshall's opinion that "An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[10] With practically no exception the courts have adhered to this injunction not to confess such violation. This, indeed, it is generally unnecessary to admit, for there is a higher forum in which that issue is settled, namely, the Executive, through recourse to diplomatic channels.[11]

During the present war a new development seemed to have been inaugurated, in that the prize court asserted its independence of executive, although not of legislative, control. In *The Zamora*[12] the Privy Council refused to give effect to an Order in Council issued under the King's prerogative, empowering the officers of the Crown to requisition ships in the prize court before a final decree of condemnation had been made. Lord Parker took occasion in a lengthy opinion to declare the court's freedom from executive control in the sense of compulsory obedience to an Executive Order issued under the prerogative, and he characterized as dictum Lord Stowell's declaration that the King in Council possessed "legislative" powers over the court. The decision has been regarded as epoch-making, but its scope can only be determined by experience. Some limitations have already become apparent. It applies only to one type of Order in Council, namely, that issued under the prerogative, and not to Orders issued under parliamentary authority, for it is conceded that Parliament can declare the law to be applied by the prize court. Moreover, even as to prerogative orders Lord Parker stated: "It cannot be assumed that any executive order is contrary to law,"—a declaration which in application will probably be found to resemble closely Marshall's injunction. He added further that the court "will act on [Executive Orders] in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be." In *The Proton*[13] opportunity was given for the application of this declaration to an Order in Council which mitigated the Crown rights by adopting that provision of the Declaration of London, article 57, which determined the nationality of a vessel by her flag. But such a criterion would have resulted in the

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[9] See the extracts from the EDINBURGH REVIEW for February, 1812, commenting upon this weakening in Lord Stowell's position as to the law administered in the prize court, quoted in 7 Moore, *Digest*, 648.

[10] *Murray v. The Charming Betsey* (1804, U. S.) 2 Cranch, 64, 118. See also *Little v. Barreme* (1804, U. S.) 2 Cranch, 170. Under our law the courts are bound by municipal statutes, regardless of their inconsistency with international law.

[11] See *Ex parte Larrucca* (1917, S. D. Cal.) 249 Fed. 981; (1918) 28 YALE LAW JOURNAL, 83.

[12] (P. C.) [1916] 2 A. C. 77.

[13] (P. C.) [1918] A. C. 578, 34 Times L. R. 309.

release of a captured vessel rightfully flying the Greek flag. It was therefore decided to disregard the Order in Council by applying the general rule of international law which determined a vessel's nationality by all the relevant circumstances,[14]—which in this case pointed to her German ownership. While international law rather than the Order in Council was held to constitute the guiding rule of the Court, it can hardly be said that this result was not influenced by the fact that the belligerent's rights were thereby better safeguarded. And in the *Stigstad*,[15] the Privy Council reverted to the position of Lord Stowell in *The Fox* by admitting the legitimacy of reprisals and retaliation as a belligerent weapon, and by refusing to consider as inconsistent with international law a Government measure of reprisal which has been universally so considered by neutrals. In theory, while concluded as to the *necessity* for retaliation by the Executive determination, the court is not precluded from holding unlawful the measure actually adopted. The necessity for reprisals being admitted, the neutral's only objection, it seems, must be confined to a claim that he suffers more inconvenience from the retaliatory measure than is reasonably necessary, an objection passed upon by a prize court of the accused belligerent. The German prize courts have gone still further, and frankly assert that they are municipal courts and will not apply a rule of international law if inconsistent with a rule laid down by municipal law or executive order for their guidance.[16]

The conclusion is obvious that the decision of a prize court, whether professing to apply international law or municipal law, cannot be binding upon a foreign government whose citizen is aggrieved by such decision. It is unnecessary to allege bad faith in the prize court. Probably no courts have shown greater probity and fairness than those presided over by Lord Stowell[17] and Sir Samuel Evans; yet it is inevitable that public policy, important as a factor of judicial decision in time of peace, should be even more potent in time of war to persuade courts to confer advantages upon their own governments. In view of their dependence upon municipal statute and their deference in large degree to Executive Order, the prize courts act practically at once as prosecutors and judges, a system not calculated to evoke confidence in

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[14] *Batten v. The Queen* (1857) 11 Moore P. C. 271; *Rogers v. The Amado* (1847, D. C. E. D. La.) 20 Fed. Cas., No. 12005.

[15] (1918, P. C.) 35 Times L. R. 176.

[16] *The Elida*, May 18, 1915 (Berlin Prize Court) 10 AMER. J. INT. L. (1916) 916; Watanabe, T., *Das Prisenverfahren* (Jena, 1903) 31. See also quotations from *The Zaanstroom* and text writers printed in Huberich and King, *The Development of German Prize Law* (New York, 1918) 10-13.

[17] It has been computed that 40 per cent of Lord Stowell's prize decisions were in favor of neutrals, and the record of American prize courts in this respect is good.

their impartiality. Prize procedure is still far from the point of development attained by municipal criminal procedure.[18]

The anomalous character of the prize decision induced Martin Hübner,[19] the Danish jurist, in the middle of the eighteenth century, to advocate an international prize appeal. Others have followed him.[20] The practice of nations discloses a certain readiness to submit the decisions of municipal prize courts to the appellate judgment of international tribunals. American contributions to that practice are to be found in article VII of the Jay treaty of 1794, under which large indemnities were recovered from Great Britain for seizures made under Orders in Council violating neutral rights; and similar indemnities were obtained from France, Spain, Naples and Denmark.[21] Under article XII of the Treaty of Washington, May 8, 1871, British subjects appealed from decisions of American prize courts and in six such cases the arbitral tribunal established by that treaty reversed the decision of the United States Supreme Court.[22] Diplomatic correspondence reveals innumerable protests against prize decisions. Both Great Britain and the United States when the European war broke out were still protesting against those of the Russo-Japanese War. Recognition of the weakness of municipal prize courts prompted the Hague plan for the establishment of an International Prize Court, which failed of successful achievement because of the inability of the nations to agree upon a scheme of representation on the court. Its necessity has been fully demonstrated by the war. It is to be hoped that the nations will prove their devotion to principles of justice by presenting no obstacles to the institution of an international forum for the hearing of appeals from municipal prize decisions rendered during the war,[23] and of a similar forum for the adjudication of other pecuniary claims. By the removal of such purely legal questions from the political channels of diplomacy to the arena of judicial settlement the nations will be able to afford concrete evidence of the efficacy of an international court of justice.

E. M. B.

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[18] Even in backward countries governments scrutinize decisions in criminal cases affecting their citizens to assure themselves of the complete independence of executive and judiciary.

[19] 2 Hübner, *De la saisie des bâtiments neutres* (La Haye, 1759) 32.

[20] See the exhaustive study on the theory of prize law, with citation of authorities, by A. Bulmerincq, in (1876) 11 *Revue de Droit Internat.* 152, 176 ff.

[21] Moore, *Arb.* 3209 ff.; 4550 ff.

[22] *The Hiawatha* (1862, U. S.) 2 Black, 635, Moore, *Arb.* 3902; *The Circassian* (1864, U. S.) 2 Wall. 135, Moore, *Arb.* 3911; *The Springbok* (1866, U. S.) 5 Wall. 1, Moore, *Arb.* 3928; *The Sir William Peel* (1866, U. S.) 5 Wall. 517, Moore, *Arb.* 3935; *The Volant* (1866, U. S.) 5 Wall. 179, Moore, *Arb.* 3950; *The Science* (1866, U. S.) 5 Wall. 178, Moore, *Arb.* 3950.

[23] In this connection see the proposal of Governor Baldwin, *An Anglo-American Prize Tribunal,* in (1915) 9 AMER. J. INT. L. 297.